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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-794

BARBARA SUSAN PAPISH,

Petitioner,

—v.—

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions, Statutes, and Regulations Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

Conclusion 10

Appendix

Opinion of United States Court of Appeals 1a

Order 21a

Judgment Denying Plaintiff Declaratory and Injunctive Relief; Judgment for Defendants 22a

Table of Authorities

Cases:

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966) 7

Cohen v. California, 403 U.S. 15 (1971) 7

Farrell v. Joel, 437 F.2d 160 (2nd Cir. 1971) 8

PAGE

Healy v. James, 408 U.S. 169 7,8

Lewis v. City of New Orleans, 40 U.S.L.W. 3614 7

Muskrat v. United States, 219 U.S. 346 (1911) 10

Rosenfeld v. New Jersey, 40 U.S.L.W. 3614 7
Roth v. United States, 354 U.S. 476 (1957) 7

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1970) 7-8

Statutes:

23 U.S.C. §1254(1) 1
42 U.S.C. 1983 4
U.S.C. Art. III, §2 10

Constitutional Provisions:

United States Constitution
First Amendment 2, 6, 9
Fourteenth Amendment 2

Miscellaneous:

University of Missouri By-Laws
Article V, Sections A and B 2, 4, 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered June 15, 1972.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 464 F.2d 136 and is set out in the appendix, *infra*, p. 1a. The opinion of the United States District Court for the Western District of Missouri is unreported and is set out in the appendix, *infra*, p. 22a.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 15, 1972. The petition for rehearing was denied on August 31, 1972 (App., *infra*, p. 21a). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether the respondents violated the First Amendment by dismissing petitioner, a graduate student at a state university, under a university regulation prohibiting "indecent speech", on the sole ground that petitioner had distributed on campus a licensed student newspaper which contained material regarded as "indecent" by some university officials, but which the Court below did not find to be obscene?

2. Whether the District Court of the Western District of Missouri had the judicial power to issue the "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning," 45 F.R.D. 133 (1968), which purports to set forth substantive standards of conduct to be applied in all student rights cases arising in that Court?

Constitutional Provisions, Statutes, and Regulations Involved

This case involves the free speech clause of the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. It also involves Article V, Sections A and B of the By-Laws of the University of Missouri, which provide as follows:

Article V—Student Body

A. The student body of the University of Missouri shall be comprised of all presently or hereinafter enrolled students. Such students are subject to classifications, as may be established from time to time by the President, or the Board of Curators, and shall be subject to such ordinances, rules, regulation and restrictions as may now

be established or hereafter from time to time established by the President or the Board of Curators.

B. Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. Obstruction of University teaching, research, administration or other activities, indecent conduct or speech, failure to comply with requests of University officials in the performance of their duties and violation of the laws of the city, state or nation are examples of conduct which would contravene this standard.

This standard applies to all forms of student conduct, and activity and registration as a student constitutes full acceptance of the fundamental standard as well as all other University rules and standards of conduct which may be adopted in implementation of this standard.

This rule of conduct shall be duly published and made available to all students enrolled in the University of Missouri.

Statement of the Case

In 1969 petitioner, Barbara Susan Papish, was a graduate student at the University of Missouri, Columbia campus, a state supported public university, where she was pursuing a program leading to a Master of Arts degree in journalism (J.A. 27a).[1] On February 19, 1969, a group of students, including petitioner, sold and distributed on the public sidewalks and thoroughfares of the Columbia campus

[1] J.A. refers to the Appendix filed in the Court of Appeals.

copies of the February 1969 edition of the "Free Press Underground", a newspaper which had been registered with the University and published for four years (J.A. 30a, 100a). There was no physical disturbance or disruption of University activities accompanying or resulting from this distribution of the newspaper (J.A. 31a).

The issue of the paper which was distributed by petitioner contained an article headlined "Motherfucker Acquitted", which concerned the trial of a member of a political group known as "Up Against the Wall Motherfucker" (J.A. 30a). The newspaper also contained, among other things, a cartoon depicting a group of policemen raping the Statue of Liberty and the Goddess of Justice (J.A. 30a).

As a result of distributing this issue of the Free Press Underground, petitioner was charged with violating Article V, §§A and B of the By-Laws of the University, which require students to "observe generally accepted standards of conduct" and which declares that the use of "indecent conduct or speech" is a violation of such standards.

After a hearing, the Student Conduct Committee of the University found that petitioner had violated the By-Law and ordered petitioner dismissed from the University (J.A. 31a). Petitioner appealed her dismissal to the Chancellor and the Board of Curators of the University, both of whom affirmed her dismissal (J.A. 31a-32a).

In September 1969, petitioner filed this suit under 42 U.S.C. 1983, seeking a permanent injunction reinstating her in the University and a declaratory judgment declaring that Article V of the By-Laws is unconstitutionally vague and overbroad (J.A. 2a-8a). Simultaneously, she moved for a preliminary injunction reinstating her to her former status as a graduate student (J.A. 21a-26a).

At a hearing before Chief Judge Becker of the District Court, petitioner submitted affidavits from members of the University faculty showing that the issue of the Free Press Underground had literary, artistic and social value, and that other publications containing four letter words were sold at the University bookstore and available in the University library (J.A. 46a-47a). With respect to the cartoon in issue, Professor Dan Bartlett of the University Art Department stated that:

> "The cartoon in question is a biting satirical depiction of the artist's view of police brutality and injustice. The obvious theme is political protest against police injustice and police interference with liberty. . . . This cartoon is very similar, although not of the same quality, as works of art by such well known figures as Goya, Rembrandt and Daumier, all of whom created works of social criticism with themes similar to that portrayed by this cartoon" (J.A. 47a).

On January 5, 1970, four months after the hearing, Chief Judge Becker issued a Memorandum stating, *inter alia*, that:

> "Under applicable standards of substance and procedure, including but not limited to those expressed in *Esteban* v. *Central Missouri State College* (C.A. 8) 415 F.2d 1077 and the *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133, a decision has been made to deny the claim of plaintiff for relief in this action" (J.A. 149a).

On May 7, 1971, a year and a half later, Judge Becker issued a decision in which he held (1) that petitioner had

no standing to maintain the action because she was a non-resident of Missouri, (2) that the Free Press Underground was legally obscene and (3) that petitioner's dismissal from the University did not violate her First Amendment rights (App., *infra*, pp. 22a-46a).

On June 15, 1972, the Court of Appeals for the Eighth Circuit issued an opinion (Ross, J., dissenting) which rejected the holding of Chief Judge Becker that petitioner had no standing to challenge her dismissal from the University, but affirmed Judge Becker's holding that petitioner's dismissal did not violate her First Amendment rights (App., *infra*, p. 1a).

The Court of Appeals did not find that the issue of the Free Press Underground distributed by petitioner was obscene. Rather, the Court held that the question of obscenity was not "relevant to disposition of the narrow issue before us", on the ground that:

> "... no provision of the Constitution requires the imposition of so high a value on freedom of expression that it can never be subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures on a University campus. *The Constitution does not compel the University to promote the vernacular of the gutter by allowing such publications as the one in litigation to be publicly sold or distributed on its open campus,* and this court will not now propound such a rule." (Emphasis added.) (App., *infra*, p. 16a.)

Judge Ross, dissenting, found that the real issue before the Court was whether the paper was "obscene." Concluding that "the cartoon and the headline, alone or together, cannot be characterized as legally obscene," he would have

ordered petitioner reinstated in the University (App., *infra*, pp. 17a-20a).

A few days after the Court of Appeals issued its decision, this Court handed down its opinions in *Healy* v. *James*, 408 U.S. 169, *Rosenfeld* v. *New Jersey*, 40 U.S.L.W. 3614 and *Lewis* v. *City of New Orleans*, 40 U.S.L.W. 3614. In light of these decisions, petitioner filed a motion for rehearing, or a hearing *en banc*. On August 31, 1972, the Court of Appeals issued an order denying, by a vote of four to four, petitioner's motion (App., *infra*, p. 21a).

Reasons for Granting the Writ

1. It is beyond dispute that the issue of the Free Press Underground distributed by petitioner was not legally obscene under the standards promulgated by this Court. See *Roth* v. *United States*, 354 U.S. 476 (1957); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966); cf. *Cohen* v. *California*, 403 U.S. 15 (1971). But despite the fact that the publication was fully protected by the First Amendment, petitioner was dismissed from the University of Missouri solely because she distributed it on campus.[2]

In upholding petitioner's discharge the Court of Appeals, in effect, held that a student can be discharged from a university for distributing constitutionally protected literature, on the theory that the constitutional rules governing publication of allegedly obscene material do not fully apply to college campuses. This holding by the Court of Appeals is contrary to the decisions of this Court in *Healy* v. *James*, *supra*, and *Tinker* v. *Des Moines Independent School Dis-*

[2] Petitioner raised below the claim that Art. V, §§A and B, *supra*, pp. 2-3, were vague and overbroad. She preserves that argument here should certiorari be granted.

trict, 393 U.S. 503 (1970), in which this Court has emphasized that the First Amendment is fully applicable on school campuses. As the Court stated in *Healy* v. *James*:

> "... [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'."

Since petitioner was dismissed solely because she distributed a constitutionally protected publication, her dismissal must be nullified.[3]

2. In September 1968, the District Court for the Western District of Missouri, *en banc*, "took the extraordinary step" (*Farrell* v. *Joel*, 437 F.2d 160, 162 (2nd Cir. 1971)) of issuing its "General Order" setting forth procedural and substantive standards to "be treated as applicable to cases in this Court wherein questions involving disciplinary action of students in tax supported institutions of higher learning are presented" (45 F.R.D. at 134). Paragraph 6 of the "General Order" provides that universities and colleges may:

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[3] The opinion of the Court of Appeals suggests that petitioner was dismissed because of the "manner in which she sought to exercise her rights" and not "for advocacy of her ideas". There is no basis in the record for this suggestion. Miss Papish was charged with violating the University By-Laws by distributing allegedly "indecent" material. Nothing in the charges against her referred in any way to the manner in which the publication was distributed, and the testimony at the school hearing and in the District Court focused entirely on the contents of the publication, and not on the manner of its distribution. Moreover, it was conceded that Miss Papish caused no disturbance whatsoever and that the paper was distributed on an area of the campus which was customarily used for distributing literature.

> "... require scholastic attainments higher than the average of the population and may require superior ethical and moral behavior. In establishing standards of behavior, the institution is not limited to the standards or the forms of criminal laws." (Emphasis added.) (*Id.* at 145.)

In short, the "General Order" grants universities the power to impose codes of "ethical and moral behavior" which a State would not be free, under the Constitution, to impose through the criminal law upon its citizens.

In the proceedings in the trial court, petitioner requested that this case be decided without reference to the standards set forth in the "General Order". However, in a "Memorandum to Counsel" issued before his decision, Judge Becker informed counsel that he had decided to reject plaintiff's claims for relief "under applicable standards of substance and procedure, including but not limited to those expressed in ... the General Order ..." (J.A. 149a). The decision issued therafter by Judge Becker explicitly relies upon the principle enunciated in the "General Order" that a university may require "superior ethical and moral behavior" on the part of its students.

In the Court of Appeals, petitioner contended that the District Court, *en banc*, had lacked power to issue the "General Order", that the standards contained in the "General Order" were repugnant to the First Amendment and, accordingly, that Judge Becker should not have relied upon the "General Order". The Court of Appeals stated in its decision that it found no support for the contention that Judge Becker had relied upon the "General Order" (App. *infra*, p. 9a, n. 10), and the Court of Appeals declined to rule upon the Order's validity. However, the fact that the trial judge was one of the authors of the "General Order", that he explicitly referred to it throughout his opinion,

and that he actually applied its standards in his decision,[4] squarely raises the question whether the adoption of the "General Order" exceeded the powers of the United States District Court for the Western District of Missouri, *en banc*. See U.S.C. Art. III, §2; *Muskrat* v. *United States*, 219 U.S. 346 (1911).

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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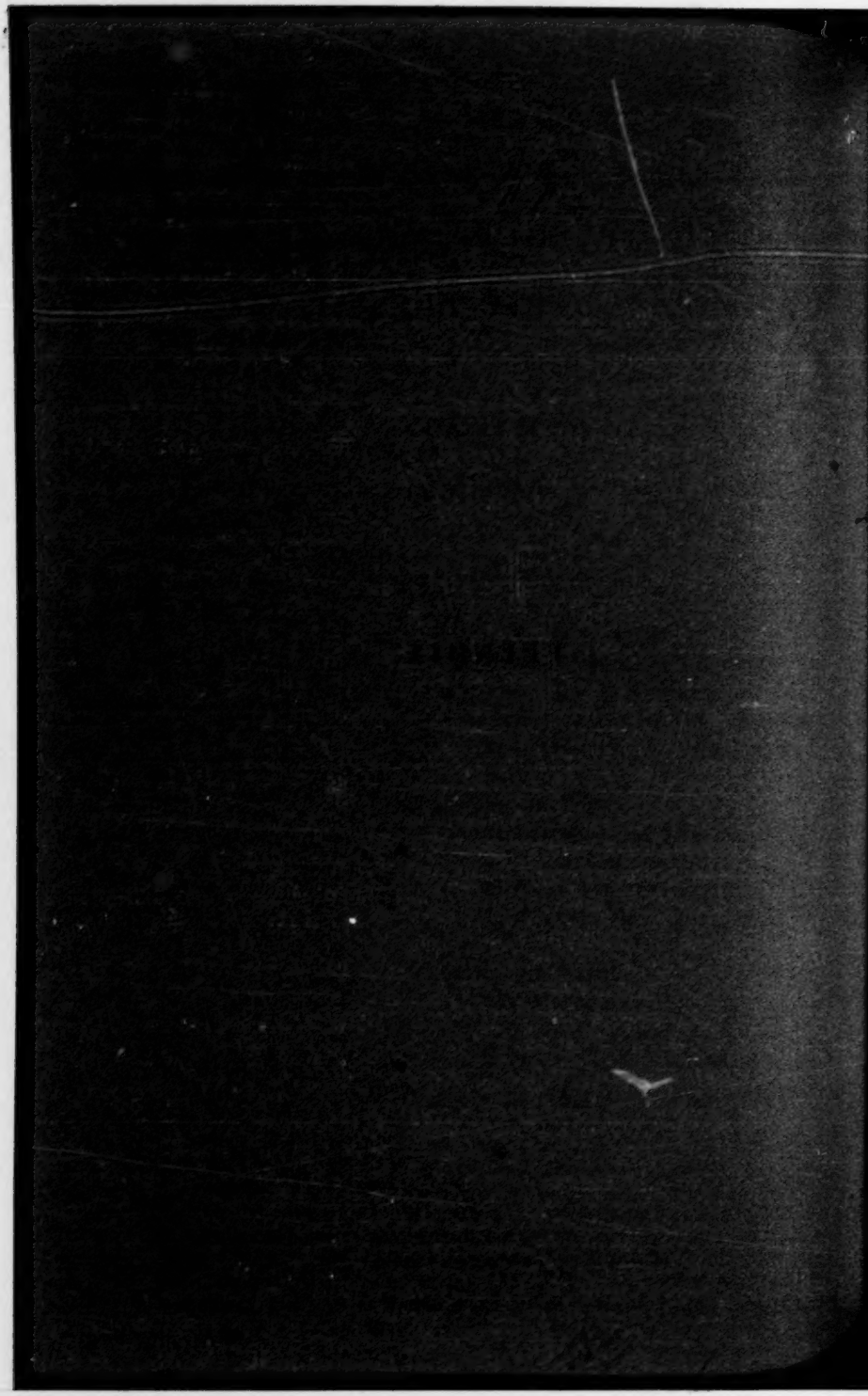
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November 29, 1972.

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[4] J.A. 149a; App., *infra*, pp. 23a, 24a, 29a, 35a, 41a.

APPENDIX



Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

No. 71-1338

BARBARA SUSAN PAPISH,

Appellant,

—v.—

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Submitted: January 11, 1972.
Filed: June 15, 1972.

Before:

VAN OOSTERHOUT, *Senior Circuit Judge,* and
Ross and STEPHENSON, *Circuit Judges.*

STEPHENSON, *Circuit Judge.*

This is a student "rights" case. It provides yet another example of the imaginative and extensive litigation in this area which seems to have as its purpose the attainment of plenary judicial oversight of the administration of tax-supported educational institutions.[1] In the present case,

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[1] In recent years, the federal courts have been inundated with an avalanche of student lawsuits dealing with such issues as hair style regulations [see, *e.g., Torvik* v. *Decorah Community Schools,* 453 F.2d 779 (CA8 1972); *Bishop* v. *Colaw,* 450 F.2d 1069 (CA8 1971); and *Freeman* v. *Flake,* 448 F.2d 258 (CA10 1971)], campus demonstrations [see, *e.g., Esteban* v. *Central Missouri State College,* 415 F.2d 1077 (CA8 1969), certiorari denied 398 U.S. 965, and *Soglin* v. *Kauffman,* 418 F.2d 163 (CA7 1969)], student publications [see, *e.g., Norton* v. *Discipline Committee of East Tennessee*

the issue arises in the context of a student dismissal, after service of written charges and after a full and fair hearing, for violation of a University rule of conduct.

I

The facts are not in dispute. Barbara Susan Papish, then a 32-year-old graduate student[2] in the University of Missouri School of Journalism, Columbia campus, was, on June 6, 1969, dismissed from the University, effective March 26, 1969, on the ground that she violated paragraph

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University, 419 F.2d 195 (CA6 1969), certiorari denied 399 U.S. 906, and *Scoville* v. *Board of Education*, 425 F.2d 10 (CA7 1970)], speaker bans [see, *e.g.*, *Brooks* v. *Auburn University*, 412 F.2d 1171 (CA5 1969)], recognition of student organizations [see, *e.g.*, *American Civil Liberties Union of Virginia* v. *Radford College*, 311 F. Supp. 893 (WD Va. 1970)], access to the student paper [see, *e.g.*, *Lee* v. *Board of Regents*, 441 F.2d 1257 (CA7 1971)], and allegedly overbroad student conduct regulations [see, *e.g.*, *French* v. *Bashful*, 303 F. Supp. 1333 (ED La. 1969), aff'd *per curiam*, 425 F.2d 182 (CA5 1970) and *Barker* v. *Hardway*, 283 F. Supp. 228 (SD W. Va. 1968), aff'd *per curiam*, 399 F.2d 638 (CA4 1968) certiorari denied 394 US 905]. Additionally, this court recently dealt with a case in which a self-proclaimed homosexual was denied employment at a tax-supported University. *McConnell* v. *Anderson*, 451 F.2d 193 (CA8 1971), certiorari denied —— U.S. —— (No. 71-978, April 3, 1972). The forerunner of these cases is, of course, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) a case from this circuit. For an exhaustive analysis of these and other cases, see principally, P. G. Haskell, Student Expression in the Public Schools, 59 Georgetown Law Journal 37 (1970) and P. G. Haskell, Judicial Review of School Discipline, 21 Case Western Reserve Law Review 211 (1970).

[2] Miss Papish's academic record reveals that she was in no rush to complete the requirements for her graduate degree in Journalism. She possesses a 1958 academic degree from the University of Connecticut; she was admitted to graduate school at the University of Missouri in September 1963; and although she attended school through the fall, winter, and summer semesters, she was, after 6 years of work, making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, Miss Papish was enrolled in a one-hour course entitled "Research Journalism" and in a three-hour course entitled "Ceramics 4." In the semester immediately preceding her dismissal, she was enrolled only in "Ceramics 3."

B of Article V of the By-Laws of the University's Board of Curators. The Article reads, in pertinent part, as follows:

> "Paragraph B: Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. Obstruction of University teaching, research, administration or other activities, *indecent conduct or speech,* failure to comply with requests of University officials in the performance of their duties and violations of the laws of the city, state or nation, are examples of conduct which would contravene this standard. (Emphasis supplied).
>
> "This standard applies to all forms of student conduct and activity, and registration as a student constitutes full acceptance of the fundamental standard as well as other standards of conduct which may be adopted in implementation of this standard."

At the time of her dismissal, Miss Papish was on disciplinary[3] and academic[4] probation.

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[3] On November 1, 1967, the Faculty Committee on Student Conduct, after notice of charges and a hearing, placed Miss Papish on disciplinary probation for the remainder of her student status at the University. The basis for her probation was her violation of the general standard of student conduct embodied in Article V and set forth in the text. This action arose out of events which took place on October 14, 1967 at a time when the University was hosting high school seniors and their parents for the purpose of acquainting them with its educational programs and other aspects of campus life. She specifically was charged, *inter alia,* with openly distributing, on University grounds, without the permission of appropriate University personnel, two non-University publications of the Students for Democratic Society (SDS). It was alleged in the notice of charges, and apparently established at the ensuing hearing, that one of these

The facts of significance may be summarized as follows. By letter under date of March 12, 1969 Miss Papish was given notice by the Dean of Students of the University that she was charged with

"violating on, or about February 18 and 19, at Columbia, Missouri, the General Standard of Student Conduct as set forth in Article V, Sections A and B of the By-Laws of the Board of Curators by failing to conduct yourself in a manner compatible with the University's functions and missions as an educational instition, in the following particulars:

"[t]hat while you were on a status of disciplinary probation you distributed or aided in the distribution of the Volume IV, No. 3, February 1969 edition of the *Free Press Underground* containing forms of indecent speech, on the campus of the University of Missouri—Columbia, with knowledge of the contents of the publication, and with knowledge that the Dean of Students had previously declared the forms of speech, therein appearing, indecent, and distribution thereof

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publications, the *New Left Notes*, contained "pornographic, indecent and obscene words, 'f---,' 'bull s---,' and 'sh--s.'" The notice of charges also recites that the other publication, *The CIA at College: Into Twilight and Back*, contained "a pornographic and indecent picture depicting two rats apparently fornicating on its cover * * *."

[4] Some two weeks prior to the incident causing her dismissal, Miss Papish was placed on academic probation because of prolonged submarginal academic progress. It was a condition of this probation that she pursue satisfactory work on her thesis, and that such work be evidenced by the completion and presentation of several completed chapters to her thesis advisor by the end of the semester. By letter dated January 31, 1969, Miss Papish was notified that her failure to comply with this special condition within the time specified would result in the termination of her candidacy for a graduate degree.

improper on the University campus under existing rules and regulations." [5]

From the verified affidavit of Miss Papish it is revealed that

"[she] is a member of the staff of the 'Free Press Underground', a newspaper published by the Columbia Free Press Corporation, a non-profit corporation organized under the laws of Missouri. The 'Free Press Underground', which has been published since 1965, disseminates news and opinion of general interest about University, local and world affairs. The paper generally is published monthly during the school year, and is distributed on the University campus and elsewhere. Written permission to distribute the paper on campus was obtained from the Business Officer of the University on April 30, 1967 in accordance with University regulations.[6]

"On February 16, 1969, I and a number of other students took part in the distribution of Volume IV, No. 3, February 1969 edition of the 'Free Press Underground' on the Columbia campus of the University, in front of the Memorial Union. Although no disruption of the University's functions occurred in connection with the distribution of the newspaper, I and three

[5] Section A of Article V reads as follows

"The student body of the University of Missouri shall be comprised of all presently or hereinafter enrolled students. Such students are subject to classifications, as may be established from time to time by the President, or the Board of Curators, and shall be subject to such ordinances, rules, regulation and restrictions as may now be established or hereafter from time to time established by the President or the Board of Curators."

[6] This contention regarding University approval is supported by stipulation of the parties.

other students who were involved in its distribution were arrested, at the instigation of the University.[1]

"The February 1969 edition of the 'Free Press Underground' contained two features which the University later contended were 'indecent'. The front cover duplicated a political cartoon which appeared in the February 1969 edition of 'The Movement', a liberal paper of national circulation. The cartoon shows helmetted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice. The cartoon is captioned '. . . With Liberty and Justice for All.' *To me, the cartoon depicts and symbolizes the evils of authoritarian brutality.* As I said in an article in the 'Free Press Underground', 'Someone might consider the cartoon on the cover of this issue 'vulgar'. It is not! it is obscene. But it is a social comment concerning a greater obscenity. Chicago cops are obscene; nepalm is the greatest obscenity of the 20th century; and administrators who fear a different view are also obscene.' *The theme of the cartoon is purely political, and the University's act of labelling it 'indecent' can be viewed as political censorship.* (Emphasis supplied).

"The second feature of the issue which the University objected to was an article concerning the acquittal of a young New Yorker after a trial for assault and battery by means of a dangerous weapon. The article was reprinted from a political newspaper, the 'New Left Notes'. The article, which discussed the trial, the composition of the jury and similar matters, was headlined 'Motherf . . . . . Acquitted.' The subject of the article is Ben Morea, the leader of a group in New York's Lower East Side called 'Up Against the

[1] The University specifically denies that it "instigated" the arrests of Miss Papish and her fellow workers.

Wall, Motherf . . . . .', also known as 'The Motherf . . . . .s'. This group is an organization purportedly dedicated to the self-defense of the poor people from police and bureaucratic harassment. The headline, 'Motherf . . . . . Acquitted', *was intended to describe Morea's organizational affiliation.* In that context, which should have been understood by our readers, the word 'Mother . . . . .' has absolutely no sexual or indecent connotations." (Emphasis supplied).

On March 26, 1969 Miss Papish was afforded a hearing by the Student Conduct Committee on the charges stated in the March 12 letter. The Committee made the general finding that Miss Papish, in distributing the February 1969 edition of the *Free Press Underground,* violated the general standard of student conduct prescribed by paragraph B of Article V and decreed her dismissal effective that date. It appears from the Committee finding that Miss Papish's then existing disciplinary probation status was a factor in its decision. The decision was appealed first to the Chancellor of the University and then to the Board of Curators and affirmed in each instance. Because her dismissal was made effective as of March 26, Miss Papish was denied credit for a ceramics course which she successfully completed subsequent to that date, but it is to be noted that she also was able to avoid the otherwise damaging consequence of recordation of the grade of "F" with regard to the other course in which she was enrolled that term.[3]

[3] Following the hearing before the Student Conduct Committee, Miss Papish obtained permission from the University Chancellor to attend classes pending review of the charges. For her post-hearing scholastic efforts, Miss Papish, but for her dismissal, would have received the grade of "B" in Ceramics and the grade of "F" in Research Journalism.

In August 1969 Miss Papish brought this action in the United States District Court for the Western District of Missouri against the University Board of Curators and against certain University officials. The complaint sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343 (3), on the ground that Miss Papish's dismissal from the University was invalid under the First and Fourteenth Amendments. The District Court denied relief on the grounds (1) that Miss Papish "does not have a federally protected or other right to attend a state university of a state of which she is not a domiciled resident or citizen"[*] and (2) that "the conduct of plaintiff for which she was dismissed is not within First Amendment protections." *Papish* v. *Board of Curators of the University of Missouri*, 331 F.Supp. 1321, 1326 (1971). In this court, Miss Papish mounts an attack on these findings along three principal lines. *First*, she asserts that her dismissal is improper because it rests solely upon her exercise of freedoms which the first amendment guarantees. *Second*, it is argued that paragraph B of Article V of the by-laws of the University Board of Curators is invalid because it is impermissibly vague and because its language demonstrates a potential for sweeping improper applications posing a substantial likelihood of deterring important First Amendment freedoms. *Third*, the contention is made that Miss Papish's residence is irrelevant to her claim that University officials acted in violation of her constitutional rights. That being so, it is said that the District Court erred in its finding that Miss Papish was precluded from obtaining relief because, due to her Connecticut residency she did not

[*] The District Court made the finding that Miss Papish was a resident of Connecticut at all times material to the events in litigation. In the view we take of the case, we deem it unnecessary to comment further on this fact and its relevance to Miss Papish's constitutional claims.

possess a federally protected right to attend the University of Missouri.[10] For reasons soon to appear, we affirm the judgment of the District Court, but we do so on grounds which depart somewhat from the reasoning followed by the able and experienced District Judge (The Honorable William H. Becker, Chief Judge).[11]

II

In the light of Miss Papish's academic difficulties, a cogent argument could be made to the effect that we must dismiss this case on the ground that it has now become moot.[12] As set forth above, Miss Papish was, effective January 31, 1969, placed on academic probation by reason of her failure to measure up to the superior academic standards required of those in pursuit of a graduate de-

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[10] In addition to the foregoing claims, Miss Papish asserts that the District Court's decision was influenced, partially at least, by the principles and guidelines set forth in the *Memorandum of Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (WD Mo. 1968). An attack is then directed against the validity of the procedures by which these rules were adopted and, as well, against the substance of the rules therein set forth. We do not find record support for this contention. Accordingly, we express no view on this aspect of Miss Papish's appellate argument.

[11] "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937). See *Brown* v. *Allen*, 344 U.S. 443, 459 (1953); *J. E. Riley Investment Co.* v. *Commissioner of Internal Revenue*, 311 U.S. 55, 59 (1940), and *United States Gypsum Co.* v. *Greif Brothers Cooperage Corporation*, 389 F.2d 252, 262 (CA8 1968).

[12] The general doctrine of mootness remains as a significant judicial tool in dealing with cases in which subsequent events remove the need for adjudication. See, for example, *Cole* v. *Richardson*, 397 U.S. 238 (1970), and *Cole* v. *Richardson*, 40 U.S.L.W. 4381, 4382 (U.S. April 18, 1972). See also, *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, 40 U.S.L.W. 4117, 4118 (U.S. January 10, 1972) and *Roudebush* v. *Hartke*, 40 U.S.L.W. 4171, 4173 (U.S. February 23, 1972).

gree. Her future as a student in good standing was made to depend on improved academic performance and upon successful work towards the completion of her thesis. So far as we are able to determine from the record, neither condition has been fulfilled.[13] Furthermore, the Chancellor of the University has stated by affidavit that Miss Papish is no longer eligible academically to continue as a student in graduate school or to remain as a candidate for a Master's degree in Journalism.[14] Thus, even if we were persuaded that Miss Papish should prevail on the merits of her constitutional claims, it appears that she would not be re-admitted to the University for reasons which are quite distinct from the considerations which led to her dismissal. This being so, we must determine whether Miss Papish's failure to meet the terms and conditions of her academic probation has mooted the case.[15]

There is one factor in this case which weighs against a finding of mootness. We are told by the University that the events in issue attracted immediate public attention and publicity. Although we suspect that Miss Papish did little to keep this affair a private one, the fact remains that the incident received comment in the local press and that the University received hundreds of letters and telephone calls supportive of its stand. Because of the stigma which arose from this publicity and attached to her reputation, we believe that there is at least a colorable basis

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[13] The record contains an affidavit submitted by a professor of journalism at the University. The affidavit recites that Miss Papish was enrolled in, *inter alia*, a one-hour course in Research Journalism during the semester of her dismissal and that had she not been finally dismissed by the University effective March 26, 1969, she would have received the grade of "F" in that course. Appendix, at p. 43.

[14] Appendix, at p. 52.

[15] The "answer [to such a] question is crucial for it is well settled that federal courts may act only in the context of a justiciable case or controversy." *Benton* v. *Maryland*, 395 U.S. 784, 788 (1969).

for finding that Miss Papish retains a significant stake in the outcome of this litigation. The same, we think, may be said for the University. Its legitimate interest in maintaining reasonable regulatory measures for the benefit of all students has been jeopardized and weakened by this lawsuit. It too deserves a definitive answer. For these reasons, we have concluded that the case is not moot.

III

We reject the contentions that the rule of conduct pursuant to which Miss Papish's dismissal was accomplished is unconstitutional on its face.

Miss Papish first points to the discretion of University officials to discipline students whose conduct or speech they deem indecent. This part of the rule, she asserts, provides the University administrators authority to inhibit protected expression which the student fears "might" fall within its proscription. In effect, it is argued that because the rule fails to provide adequate notice as to what conduct or speech is permissible and what is not, and because it encourages arbitrary and erratic disciplinary action, it is unconstitutionally vague and must be excised. We are told that such unbridled discretion "is nothing less than an invitation to invidious censorship and cannot stand under the First and Fourteenth Amendments." This type of argument is not novel. It is not unlike that advanced in *Esteban* v. *Central Missouri State College,* n.1, *supra.* We believe that this court's decision in that case controls disposition of these contentions here. There it was said that

> "[There is] little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct. Certainly these regulations are not to be compared with the criminal statute. They are codes

of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than in specific terms." *Id.*, at 1088.

The rule of conduct attacked here is not ambiguous. It does, to be sure, invest University officials with some flexibility and discretion. But it does not, as Miss Papish would have us believe, invite invidious censorship. The standard contained in the rule restricts University administrators to disciplining expressive conduct in those situations where such a course is necessary to preserve and enhance the University's function and mission as an educational institution. Certainly the language of the rule, together with the governing standard embodied therein, can be easily understood by anyone who possesses the intelligence to gain admission to an accredited institution of higher learning. In our view, the Constitution requires no more.

It is said that even if the rule is not unconstitutionally vague, it is overly broad since, essentially, it is susceptible of application to speech or conduct that is protected by the First and Fourteenth Amendments. We disagree. Since *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), it has been recognized that

> "[a]llowing the broadest scope to the language and purposes of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances; [that] there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem; [that] these include the lewd and obscene, the profane, the libelous, and the insulting

> or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace; [and that] it has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at pp. 571-572. (Footnotes omitted).[16]

Viewed from the *Chaplinsky* perspective, the challenged provision of the rule at issue does not permit arbitrary or sweeping infringement of constitutionally protected interests in a degree not necessary to preserve an appropriate educational environment. It does not confer upon University administrators virtually unbridled and absolute power to suppress with impunity conduct or speech which they deem distasteful. Rather, the rule serves the narrow purpose of authorizing punishment only of those who engage in conduct or speech that detracts from the effectiveness of the educational process—conduct or speech that frustrates University pursuit of its function and mission as an institution of higher learning. It is this objective and definite standard by which the rule is to be applied that, for us, saves its validity in the face of an overbreadth attack. What the express language of the rule fails to articulate is necessarily capable of being supplied by the student tempted to call its validity into question. Compliance requires common sense and minimal respect for the lawful rights of others, not legal acumen.

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[16] See *Gooding, Warden* v. *Wilson*, 40 U.S.L.W. 4329, 4330-4332 (U.S. March 23, 1972). *Gooding*, while recognizing the continuing vitality of the Chaplinsky doctrine, holds that when an overbreadth attack is levied aganist a *criminal* statute, courts will exercise a stricter scrutiny. See also *Cohen* v. *California*, 403 U.S. 15, 18-22 (1971) and *United States* v. *O'Brien*, 391 U.S. 367, 376, 382 (1968).

On this record it sufficiently appears that the rule furthers the legitimate University interest in providing the order and discipline essential to fostering an effective learning process and that its restriction on constitutional freedoms is no greater than is essential to the furtherance of that interest.

IV

We are not persuaded by Miss Papish's contention that even if the rule of conduct under which she was disciplined is not void on its face, it has been unconstitutionally applied in this instance.

As noted above, the parties concede that it was the attempted sale[17] of the *Free Press Underground* that produced the disciplinary action to which Miss Papish now excepts. She argues that the newspaper sold and distributed by her does not lose its First Amendment protection simply because it contained indecent speech, and, in any event, she denies the newspaper contains material which can be labeled "legally obscene." She asserts that such publications as the one she attempted to sell at the crossroads of the campus "create an educationally stimulating atmosphere, promote critical thought, and encourage debate." Finally, she informs us that the University bookstores permit the sale of nationally popular publications which contain erotic and vulgar passages. This latter point, we assume, is to suggest that the apparent inconsistency of dismissing her for sale of the *Free Press Underground* and inviting the reading of other allegedly

[17] The record does not clearly reveal whether the newspaper was being "sold" or whether Miss Papish was distributing it free of charge. We note, however, that the newspaper cover recites a sales price of $.15, and that the Dean of Students testified to his purchase of several copies.

similar literature is so unfair and unreasonable as to constitute constitutionally cognizable harm.[18]

Miss Papish's arguments with regard to unconstitutional application readily reduce themselves to a contention that she had a right to express a controversial and unpopular point of view, free from University regulation and interference. With that contention we partially agree.

But there is no evidence in this record to indicate that the University so applied its rule of conduct as to penalize Miss Papish for advocacy of her ideas. Nor does the record evidence reveal that she unsuccessfully sought permission to sell her publication in the University bookstores.[19] What the record does reflect is an application of the rule to discipline Miss Papish for the manner in which she sought to exercise her rights. Given the absence of record evidence to indicate that the University sought, in any manner, to restrict the substantive message the *Free Press Underground* conveyed, we do not believe that Miss Papish has sustained First Amendment harm. The University could and did rightfully regulate the means by which she sought to espouse her views, but it did so without effectively repressing her ability to advocate the causes

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[18] Compare, as to this aspect of Miss Papish's argument, *Keefe* v. *Geanakos*, 418 F.2d 359, 362 (CA 1 1969), and *Vought* v. *Van Buren Public Schools*, 306 F. Supp. 1388, 1394-1396 (ED Mich. 1969). We reject the import of such an argument. The mere fact that the University permits the sale of certain material in its bookstore does not, without more, inevitably lead to the conclusion that every University student should be free to distribute such material, as he sees fit, in other areas of the campus. We believe that the University has inherent authority to impose reasonable retrictions as to time, place and manner of sale or distribution.

[19] Indeed, the parties have stipulated that the University had granted permission to the *Free Press Underground* to sell its publication on campus. That being so, there is little basis upon which to conclude that the University would entirely close the door to campus distribution.

to which she professed such profound dedication. We know of no constitutional prohibition precluding that course of University regulatory action.[20]

We express no view as to whether the *Free Press Underground* contained materials which can be adjudged obscene *per se* under contemporary legal standards. Nor do we think that consideration to be particularly relevant to disposition of the narrow issue before us. We are aware that free expression plays a vital role in the democratic process. But no provision of the Constitution requires the imposition of so high a value on freedom of expression that it can never be subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures on a University campus. The Constitution does not compel the University to promote the vernacular of the gutter by allowing such publications as the one in litigation to be publicly sold or distributed on its open campus, and this court will not now propound such a rule. Whether such publications must be made available in its bookstores is an issue not properly before us.

The notion that federal courts should not cavalierly interfere in the internal affairs of this Nation's colleges and universities has found expression in earlier decisions of this court. *McConnell* v. *Anderson*, n.1, *supra*. *McConnell* accordingly held that we will not overturn the action of University administrators in the absence of an affirmative showing that it was premised upon an arbitrary, unreasonable or capricious determination. From what we have said it is clear that the University action in this case cannot fairly be described as arbitrary, unreasonable or capricious. In point of fact, this is one of those cases,

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[20] Cf. *Cohen* v. *California*, *supra*, pp. 18-19 of 403 U.S. See also *Norton* v. *Discipline Committee of East Tennessee University*, n. 1, *supra*; *Hatter* v. *Los Angeles City High School District*, 310 F. Supp. 1309 (CD Calif. 1970), and *Baker* v. *Downey City Board of Education*, 307 F. Supp. 517 (CD Calif. 1969).

not at all unfamiliar in student-school litigation, where disciplinary action resulting from crass and absurd conduct is sought to be made redressable by characterizing the underlying factual events in constitutional terms. We hold that the First Amendment does not invalidate the University's dismissal of Miss Papish, and that Chief Judge Becker was quite correct in finding that the University was entitled to judgment.

Affirmed.

Ross, Circuit Judge (dissenting).

I respectfully dissent. It is clear that Miss Papish was dismissed from the University because of a finding that the cartoon, depicting helmeted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice, and the headline, "Motherfucker Acquitted", were obscene. This objectionable material appeared in the *Free Press Underground,* a publication which had been distributed on campus, with the University's permission, for almost two years. The distribution of this particular edition, by Miss Papish, however, was found to be in violation of the Board of Curator's by-law proscribing "indecent conduct or speech." The dismissal could not have been on the basis of physical disturbance or disruption resulting from the distribution, because it was admitted, by stipulation, that there had been none. Rather, the record amply demonstrates that Miss Papish was disciplined for the content of the newspaper, rather than merely its distribution.

The trial court found that the cartoon and the headline were obscene, were "pandered" by Miss Papish, and were therefore not protected by the first and fourteenth amendments. In this Court, the Board of Curators argue that the cartoon, appearing on the cover of the newspaper, and the headline, appearing on the second page, taken together, supply the erotic connotations necessary to be

considered legally obscene under the *Roth* standard. *See Roth* v. *United States,* 354 U.S. 476, 489 (1957). It is clear to me that the cartoon and the headline, alone or together, cannot be characterized as legally obscene.

The cartoon, a hard-biting social comment, may be revolting to most persons, but it certainly cannot be considered obscene under the standards enunciated by the Supreme Court. As stated in an affidavit submitted by an associate professor of art at the University, "[t]he cartoon in question is a biting satirical depiction of the artist's view of police brutality and injustice. The obvious theme is a political protest against police injustice and police interference with liberty."

Likewise, the word "motherfucker", common in the modern radical genre,[1] and used as it was in the news story in question, does not conjure up erotic thoughts of incestuous conduct. *Cf. Cohen* v. *California,* 403 U.S. 15, 20 (1971). In *Cohen,* the Supreme Court held that the words "Fuck the Draft" written upon a jacket, and publicly displayed in a state courthouse in front of women and children, was a protected exercise of the "freedom of speech" guaranteed by the Constitution. The Court held that not only was that expression not legally obscene, but also that the State of California had no overriding justifiable interest in regulating it as "offensive conduct." Certainly a word, such as was used in the *Free Press Underground,* comes as no great shock to the majority of today's youth; and the University cannot validly be said to have an overriding justifiable interest in protecting college-age students from exposure to it. *Cf. Keefe* v. *Geanakos,* 418 F.2d 359, 361 (1st Cir. 1969).

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[1] *See* Lifton, "The Young and the Old", *Atlantic Monthly* (Sep. 1969), for the etymology of the word. This article was introduced by plaintiff as evidence of the type of literature, containing the same word, that was being sold in the campus book store. The same article was also the subject of the litigation in *Keefe* v. *Geanakos,* 418 F.2d 359 (1st Cir. 1969).

There is no doubt an educational institution has authority to prohibit legally obscene material from its campus, because that material retains no constitutional protection. It likewise has authority to regulate dissemination of forms of speech or conduct that is something less than obscene, if that action is calculated to or has the potential effect of being disruptive to the educational process. In such a case, it is the act of dissemination, and the resulting disruption, rather than solely the content of the material disseminated, which is offensive. For a regulation prohibiting such conduct to be constitutionally valid, the student's interests of free expression must be outweighed by the University's interest in protecting its educational process. *See Scoville* v. *Board of Education,* 425 F.2d 10, 14 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970). Moreover, "the standard of conduct which a college seeks to impose must be one relevant to 'a lawful mission, process or function of the educational institution' . . . ." *Esteban* v. *Central Missouri State College,* 415 F.2d 1077, 1088 (8th Cir. 1969). In the absence of constitutionally valid reasons to regulate speech or conduct, students are entitled to freedom of expression of their views. *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503, 511 (1969).

> "Obviously, one does not lose his first amendment rights by matriculation at a college. Those rights follow one through the classroom door . . . . And what better or more ideal place is there for free discussion and for the exchange of ideas than academic halls?" *Esteban* v. *Central Missouri State College, supra,* 415 F.2d at 1085.

It is argued that the fact Miss Papish was distributing "indecent" material on the sidewalks of the campus distinguishes this case from other methods of distribution or exchange of ideas. However, upon the facts of this case,

this argument disregards the premise that the touchstone is disruption or interference with the legitimate educational processes of the University. There must have been more than "mere fear and apprehension of possible disturbance." *Esteban* v. *Central Missouri State College, supra,* 415 F.2d at 1087; *see Tinker* v. *Des Moines School Dist.,* 393 U.S. at 514. Yet, from the record in this case, it cannot be said that the requisite disruption was imminent.

While I wholeheartedly agree that a school has latitude and discretion in formulating its regulation of general standards of conduct, *Esteban* v. *Central Missouri State College, supra,* 415 F.2d at 1088, in a case where a student's constitutional rights are being infringed, those rules and regulations must be related to the legitimate interests of protecting its educational process. By dismissing Miss Papish for the reasons it gave, without a showing of disruption to that process, the University violated her rights of free expression guaranteed by the first and fourteenth amendments. I would, therefore, reverse the district court, and order Miss Papish reinstated unless she is barred from reinstatement for valid academic reasons.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Order

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1338.

BARBARA SUSAN PAPISH,

Appellant,

—VS.—

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied by an evenly-divided Court.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

August 31, 1972

Judgment Denying Plaintiff Declaratory and Injunctive Relief; Judgment for Defendants

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

Civil Action No. 1466

BARBARA SUSAN PAPISH,

Plaintiff

—v.—

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, *et al.*,

Defendants

FILED
May 7 - 1971
J. C. TRUMAN, *Clerk*
VIRGIL B. COOK
Deputy Clerk

Plaintiff, formerly a graduate student in journalism in the University of Missouri at Columbia, has brought this suit for declaratory and injunctive relief under Section 2201 of Title 28, United States Code, and Section 1983 Title 42, United States Code, as a result of her dismissal from the University on a charge of participating in the distribution of indecent publications on and near the university campus. Plaintiff seeks a declaration of this Court that Article V of Sections A and B of the By-Laws of the

Board of Curators of the University of Missouri, which relates to "indecent conduct or speech," is invalid on its face and as applied in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff further requests injunctive relief permanently to restrain defendants "from interfering with plaintiff's right to remain at the University of Missouri-Columbia campus and to complete her education . . . and directing defendants to reinstate her as a graduate student"; permanently to restrain defendants "from interfering with plaintiff's constitutional right to disseminate literature protected by the First Amendment"; and to direct defendants "to take any and all steps necessary to grant plaintiff her full credit for course work successfully completed in the Spring Term of 1969." Plaintiff was enrolled as a non-resident graduate student in journalism when the acts occurred which led to her dismissal.

On September 22, 1969, a plenary evidentiary hearing *de novo* was held in this case on the motion for preliminary injunction in accordance with the uniform practice of this Court in student discipline cases.[1] By agreement, the case

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[1] Apparently there is a misunderstanding by some of the practice and procedure in student discipline cases in this district. This is found in the dissenting opinion in *Esteban* v. *Central Missouri State College* (C.A. 8), 415 F.2d 1077 at pages 1090 to 1096. The dissenting opinion, after agreeing with the four substantial bases of jurisdiction in student disciplinary cases, states:

> "However, I reject the district court's procedural approach of reviewing the sufficiency of the disciplinary proceedings conducted by school officials. The trial court has posited the test to be:
>
> 'A federal district court *in appropriate circumstances* will review a student disciplinary proceeding to determine if the challenged disciplinary action was on grounds *lacking* support by any substantial evidence.'" (Emphasis added.)

In footnote 1 at page 1090 the dissenting opinion further stated:

> "Presumably, this last statement is based upon the district court's 'General Order on Judicial Standards of Procedure and Substance In Review of Student Discipline in Tax Sup-

on the merits was also submitted on this record. Full opportunity for argument and filing of briefs was afforded. On January 5, 1970, before the next semester began, the parties were advised that a decision had been reached to

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ported Higher Education,' 45 F.R.D. 133 (1968). The same standard of review is erroneously compounded in other cases from the same district, see, e.g., *Scoggin* v. *Lincoln University*, 291 F. Supp. 161."

From these statements the dissent erroneously concludes that it is the practice in this district to review state student discipline cases in the manner federal agency actions are reviewed under the federal Administrative Procedure Act. The *Scoggin* case is cited as an example. *This conclusion of the dissent is directly contrary as a matter of fact to the record in every student discipline case in this district, including the two* Esteban *cases, the* Scoggin *case, this case, and all other student discipline cases.* In every such case the parties have been afforded the opportunity to develop a full evidentiary record. For example, in the *Scoggin* case this is made clear in the second paragraph which states:

> "Pursuant to procedures directed and agreed upon at a pretrial conference, the parties prepared and filed a full stipulation of facts. *At the plenary evidentiary hearing,* both parties advised that neither wished to adduce any additional evidence." (Emphasis added.) 291 F. Supp. 161 at page 162.

This Court, in its General Order referred to, intended neither to state, nor did it state, that "review" of student discipline is limited to review as under the Administrative Procedure Act. The word "review" was not used in that sense. This is evident from the description of the nature of the action, as an (a) action at law for damages, triable by a jury; (b) a suit in equity under Section 1983; or (c) a declaratory judgment action under Section 1983 and Section 2201, which may be legal or equitable in nature, depending on the issues therein. 45 F.R.D. 133 at page 143. Charles Alan Wright, one of the foremost authorities on federal procedure, found no limited administrative procedure type of review in his analysis of the General Order of this district. Wright, *The Constitution on the Campus*, 22 Vanderbilt Law Review 1027 (1969). As perceptively stated in a student law review note:

> "If the Court does not mean 'review' in the procedural sense, then Judge Lay's dissent and potential controversy disappears." 4 Georgia Law Review 221, 230.

What the portion of the General Order referred to does mean is that, although the disciplinary procedures of the educational institution are otherwise flawless, if there is no substantial evidence of any misconduct received, a finding of misconduct violates the due process clause. Relying on the apposite case, *Thompson* v.

deny the relief sought and that the time for filing post-judgment motions or to appeal would not begin to run until the formal findings of fact and conclusions of law

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City of Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed.2d 654, Le. 659, the General Order so states. 45 F.R.D. at page 147, including note 13. The portion of the General Order is quoted and relied on in the *Scoggin* case. 291 F. Supp. at page 171. It is difficult to see how this clear language could be misunderstood.

If an educational institution gives notice and grants a hearing but no evidence of misconduct is submitted, a finding of misconduct violates due process standards and the Court should hold the finding of misconduct impermissible under constitutional due process standards, whether other evidence is offered in Court or not. This is only one constitutional test mentioned in the General Order of this Court. If the educational institution may offer evidence of misconduct for the first time in the action challenging the student discipline, there is no motive or need to receive evidence of misconduct at the institution's disciplinary hearing. On the other hand, if lawful notice and fair hearing are granted by the institution, ample evidence of misconduct received, reliable findings made and opportunity to be heard granted, should there be a trial *de novo* on the same factual issues in a federal civil rights action? *Barker v. Hardway* (C.A. 4), 399 F.2d 638, cert. denied, 394 U.S. 905, 89 S. Ct. 1009, 22 L. Ed.2d 217, cited in the *Esteban* dissent for the affirmative answer to this question falls short of such an explicit holding. The precise language in the *Barker* case was:

> "We believe the district judge correctly concluded that the administrative appeals which the college afforded the students satisfied the requirements of due process of law. In any event the district judge granted them a plenary *de novo* hearing with counsel. It was upon the evidence received at this hearing that he based his own findings concerning the conduct that led to their suspension. The proceedings in the district court render moot the students' contention that they were denied due process at the college level."

This language falls far short of holding that: "A civil rights action under § 1983 is a separate proceeding which requires a trial de novo on the claim relating to a denial of federal rights." Cf. dissent in *Esteban* case, 415 F.2d at page 1091. The unsolved question is what would have been the ruling in the *Barker* case if a *de novo* hearing on the misconduct issue had not been granted by the district court, and the institutional disciplinary hearing had been lawful and fair and the evidence of misconduct received at that hearing substantial. Only time will answer this question. In the meantime, in this district, all parties are offered a plenary evidentiary hearing in this Court in student discipline cases.

While discussing the General Order of this district Professor Wright comments that the General Order and the process by which

were filed. Because of the pending possible review of the case of *Esteban* v. *Central Missouri State College* (C.A. 8), 415 F.2d 1077,[2] in the Supreme Court of the United States, and of *Soglin* v. *Kauffman* (W.D. Wis.), 295 F. Supp. 978, disapproved in part in the *Esteban* case, *supra*, 415 F.2d at page 1099 (later affirmed in (C.A. 7) 418 F.2d 163) and because of other relevant cases pending in the Supreme Court of the United States,[3] the entry of final judgment in this case was stayed. Later, certiorari was denied in the *Esteban* case at 398 U.S. 965, 90 S. Ct. 2169, 26 L. Ed.2d 548. The *Soglin* case was not reviewed by the Supreme Court of the United States.

Plaintiff was dismissed from the University of Missouri at Columbia for her part in distributing, in and near the Memorial Tower,[4] on February 19, 1969, Volume IV, No. 3,

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it was arrived "smack more of a legislative committee or an administrative agency than they do of a court of law" to those who are old fashioned. Wright, *The Constitution on the Campus*, *supra*, at page 1033. In response it should be said that there are few occurrences which impair the administration of justice more than the contemporaneous and persistent enunciation and application of conflicting rulings of substance and procedure by judges of a multiple judge court with concurrent jurisdiction. To prevent such conflicts by an honest, thoughtful agreement on sound principles after hearing all known interested public and private parties is judicial administration of the highest order. This is the everyday judicial function of a multiple judge appellate court. The function does not become a legislative one when performed by a multiple judge district court. The real test of its desirability and legality is the quality of the product.

[2] Affirming (W.D. Mo.) 290 F. Supp. 622.

[3] See, e.g., *United States* v. *Thirty-Seven Photographs*, 39 U.S. Law Week 3442; *Cohen* v. *California*, 39 U.S. Law Week 3443; *United States* v. *Reidel*, 39 U.S. Law Week 3444.

[4] The Memorial Tower is the central unit of integrated structures dedicated to the memory of those students who died in the Armed Services in World Wars I and II. Other adjacent units include the Student Union and a Non-Sectarian chapel for prayer and meditation. Through the Memorial Arch pass parents of students, guests of the university, students, including many persons under 18 years of age and high school students. Stephens, *History of U. Of Mo.*, 1962, 620-632.

the February 1969 edition of the *Free Press Underground.* Plaintiff's accomplice Markham was distributing the publication on university property. Plaintiff was a 32 year old adult member of the staff of the *Free Press Underground,* a newspaper which had been published since 1965 by the Columbia Free Press Corporation, a non-profit corporation organized under the laws of Missouri, which disseminated news and opinions on university, local and world affairs. The February 1969 edition of *Free Press Underground* contained two features which the university deemed "indecent" within the terms of its by-laws: (1) the front cover duplicating a political cartoon which appeared in the February 1969 edition of *The Movement,* a liberal paper of national circulation and depicting policemen raping the Statue of Liberty and the Goddess of Justice; and (2) an article reprinted from *New Left Notes* concerning the acquittal of a young New Yorker after a trial for assault and battery by means of a dangerous weapon headlined "Mother————Acquitted." The word "Mother————" had no relation to the news story discernible by an ordinary person. The plaintiff knowingly and intentionally participated in distributing the publication to provoke a confrontation with the authorities by pandering the publication with crude, puerile, vulgar obscenities. She admits in her affidavit in support of her motion for preliminary injunction that the cartoon is obscene, stating in part: "It is not [vulgar]; it is obscene." Earlier, on February 12, 1969, the Dean of Students had specifically directed that distribution of the same publication be discontinued because it violated university regulations against indecent literature. Plaintiff had been placed on disciplinary probation for distributing on university day an equally indecent issue of the same publication. She was also on academic probation for failure to submit portions of her thesis. This failure continued until the date of trial. As a result plaintiff is

academically ineligible to continue as a student of the university.

On March 12, 1969, pursuant to Rule 5(c) of the university's rules of procedure in student disciplinary matters, plaintiff received notice of charges against her pending before the Student Conduct Committee, based on the above cited Article V of Sections A and B of the by-laws, of conducting herself "in a manner [not] compatible with the University's functions and missions as an educational institution," in the following particulars:

> "That, while you were on a status of disciplinary probation, you did distribute, or aid and assist in the distribution of the Volume IV, No. 3, February 1969 edition of the *Free Press Underground* containing forms of indecent speech, on the campus of the University of Missouri-Columbia, with knowledge that the Dean of Students had previously declared the forms of speech, thereon appearing, indecent and distribution thereof improper on the University campus under existing rules and regulations."

A hearing was subsequently conducted before the Student Conduct Committee which concluded in the Committee's recommendation that plaintiff be dismissed from the university. The recommendation was adopted and affirmed by the Chancellor and the Board of Curators. In addition to being dismissed, plaintiff was denied credit for a course in ceramics which she successfully completed during the pendency of the intra-university appeals and disciplinary hearings. She was permitted to finish the semester for which she was enrolled.*

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* Plaintiff complains among other things of failure to give her credit for the credit she says she earned in completing this course. She has, however, failed totally to prove that, under University regulations, a dismissed student is entitled to credit for courses completed after the acts resulting in dismissal. It appears, therefore, that this complaint is unfounded.

Student discipline cases of this type are cognizable in the federal district courts if the dismissal, suspension or other penalty imposed upon the student involves the violation of one or more of his or her federally protected rights under color of state law within the meaning of the Federal Civil Rights Act, Section 1983, Title 42, United States Code. See *General Order on Student Discipline in Tax Supported Institutions of Higher Education* (W.D. Mo.), 45 F.R.D. 133, 135. In this case, plaintiff does not raise any question that the procedures of notice and hearing leading to her dismissal failed to comply with minimal standards of due process. Further, it appears that plaintiff received fair notice of the charges and the hearing, an opportunity to be heard in a substantially fair disciplinary hearing; and that the findings of fact upon which the disciplinary action was based were supported by substantial evidence. See *General Order, supra.*

Based on the foregoing facts, it is concluded that judgment must be rendered for defendants in this cause for the separate and independent reasons that (1) plaintiff does not have a federally protected or other right to attend a state university of a state of which she is not a domiciled resident or citizen and (2) the conduct of plaintiff for which she was dismissed is not within First Amendment protections.

Plaintiff was not at any material time a citizen or domiciled resident of Missouri. In basing her claim on Section 1983, Title 42, United States Code, plaintiff asserts that she has been denied a civil right to attend the university of Missouri. It has long been held, however, that one state cannot be held responsible for the education of citizens of another state. In *State of Missouri* ex rel. *Gaines* v. *Canada*, 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208, 213-214, it was said:

"Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, —each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. The separate responsibility of each state within statehood maintained under our dual system."

It is well settled that the Federal Civil Rights Act was intended to protect from denial under color of state law only those rights granted to citizens of the United States under the Fourteenth Amendment or laws of the United States. *Adickes* v. *S. H. Kress and Company,* 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed.2d 142. The right to attend the University of Missouri, however, is extended by state law, §172.360 RSMo, which provides as follows:

"All youths, resident of the state of Missouri, over the age of sixteen years, shall be admitted to all the privileges and advantages of the various classes of all the departments of the university of the state of Missouri without payment of tuition; provided, that each applicant for admission therein shall possess such scholastic attainments and mental and moral qualifications as shall be prescribed in rules adopted and established by the board of curators; and provided further, that nothing herein enacted shall be construed to prevent the board of curators from collecting reasonable tuition fees in the professional departments, and the necessary fees for maintenance of the labora-

tories in all departments of the university, and establishing such other reasonable fees for library, hospital, incidental expenses or late registration as they may deem necessary."

"Residence" in this and other Missouri statutes means legal residence or domicile. See cases collected in Mo. Ann. §9(e), Restatement of Conflict of Laws (A.L.I. 1937); *State ex rel. Reardon* v. *Mueller*, Mo. App., 388 S.W.2d 53.

The right, therefore, is accorded under the state law, not under the federal constitution or laws. In the absence of exceptional circumstances not present in this case, no violation of plaintiff's federal rights of due process or of equal protection can therefore be predicated on her dismissal from the University of Missouri when she was not a domiciled resident of Missouri. In *Flemming* v. *Adams* (C.A. 10), 377 F.2d 975, 977, it was held that the "right to an education" is not "among those rights guaranteed by the federal constitution." See also *Steier* v. *New York State Education Commissioner* (C.A. 2), 271 F.2d 13, 18, to the effect that "Education is a field of life reserved to the individual states." In *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180, it was held that the requirement that education be provided equally to all persons in the state applies "Where the state has undertaken to provide [the opportunity of education]." 98 L. Ed. at 880. If the rule were otherwise, intolerable burdens to educate citizens of other states could be imposed on any state by citizens of other states. Cf. *Johns* v. *Redeker* (C.A. 8), 406 F.2d 878; *Clarke* v. *Redeker* (D. Iowa), 259 F. Supp. 117.

In opposition to this conclusion, plaintiff contends that §1983:

> "... does not differentiate between citizens on the basis of their residence. It gives 'any citizen' the right to maintain an action against 'every person' who has subjected him to a deprivation of constitutional rights."

As pointed out above, however, because of plaintiff's citizenship and domicil no constitutional or federal statutory right to attend Missouri University was denied to plaintiff by her dismissal from Missouri University. Plaintiff rejoins that a state cannot discriminate against citizens of other states in favor of its own, citing *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 511, 59 S. Ct. 954, 83 L. Ed. 1423; *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 68 S. Ct. 1138, 92 L. Ed. 1478; *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed.2d 600; and *Spanos* v. *Skouras Theatres Corp.* (C.A. 2), 364 F.2d 161. None of those cases, however, relate to education as provided by a state and are distinguishable on that ground, as well as other grounds. No discrimination is shown in the case at bar, when plaintiff might have easily availed herself of her right under the laws of the state of her domicil to attend the state universities or colleges there. This case is unlike that of *Shapiro* v. *Thompson, supra,* in that, in *Shapiro,* the plaintiff was actually a resident of Connecticut but was compelled by a state law to wait until she had been a resident for at least one year to be eligible for state welfare benefits. In contrast, plaintiff in this case is not a domiciled Missouri resident. There is no restriction on the right of plaintiff to travel and resettle when plaintiff has concededly maintained her domicil in a state other than Missouri. Plaintiff further contends that:

". . . [r]ecognizing the immateriality of a student's residence, the federal district courts have upheld suits by nonresidents brought under Section 1983 against state university officials. See, for example, *Wilson* v. *White*, G.C. 6852-2 (unreported)—(N.D. Mississippi); *Zanders* v. *Louisiana Board of Education*, 281 F. Supp. 747."

But there is no indication in *Zanders* that any of the plaintiffs were nonresidents of Louisiana, under the laws of which they claimed the right to attend Grambling College. And if the referenced unpublished decision is in fact contrary to the principles and authorities cited herein and relied on by this Court, then there is no requirement that it be regarded as a controlling or persuasive authority. From the foregoing, it is apparent that plaintiff in this cause can, as a domiciled resident of another state than Missouri, claim no federal right to attend the University of Missouri.

Plaintiff next argues that "having admitted plaintiff as a student, the University must apply the same disciplinary standards to her as it does to resident students." Assuming without holding that that is a sound statement, there is no showing that the same disciplinary standards have not been applied and that discrimination in this regard appears. *Adickes* v. *S. H. Kress and Company, supra.* No denial of equal protection of the laws appears.

The position of plaintiff is not supported by the case of *Dixon* v. *Alabama State Board of Education* (C.A. 5), 294 F.2d 150, in which it was stated that, although "The right to attend a public college or institution is not in and of itself a constitutional right" (294 F.2d at 156), the right to notice and a hearing nevertheless attached once the student had been admitted. Here the notice and hearing

procedures are not challenged under the due process clause. At most by being admitted to Missouri University plaintiff acquired a contractual right for the period of enrollment for attendance subject to compliance with the scholastic and behavioral rules of the university and to dismissal for violation thereof, provided the dismissal was not arbitrary or capricious. *Esteban* v. *Central Missouri State College, supra; Wright* v. *Texas Southern University* (C.A. 5), 392 F.2d 728. Perhaps the university thereby became obligated to refrain from dismissal by procedures which violated concepts of fairplay or minimal due process, but no such violation is shown in the case at bar. It is therefore concluded that plaintiff, because of her nonresidence, has not shown any violation of her federal rights by being dismissed as a student from the University of Missouri under procedures complying with due process standards.

Treating plaintiff's claim for relief as an action based solely on diversity of citizenship, no breach of duty by defendants under state law is proved.

Further, plaintiff's contentions that First Amendment protections apply are without merit. Plaintiff contends that the material distributed by her could in no wise be deemed indecent or "obscene" under judicial decisions respecting the First Amendment right of freedom of speech (though she swears the cartoon was obscene); and therefore that to subject her to discipline for such distribution is to infringe upon her constitutional rights of free speech in the interest of no lawful mission of the university. Further, it is plaintiff's contention that the university by-law on indecent materials, if it includes such materials as distributed by plaintiff, is invalid on its face as applied, or, alternatively, that plaintiff's conduct, as a matter of law, did not constitute a violation of the by-law. Plaintiff notes

in this regard that the distribution of the allegedly "indecent" material was accompanied by no violence or other proscribed conduct; that, in the hearing in this Court, Professor William Wiecek, a historian and lawyer, testified that the word "motherf————" had appeared in leading nationally-distributed magazines, some of which are sold at the university bookstore or maintained in the university library; that Professor Dan Bartlett of the university art department testified that the cartoon had social merit as a social criticism of police brutality, "similar in theme, although not in quality, to works of social criticism done by such artists as Goya, Rembrandt and Daumier"; and that so much of the *General Order, supra,* as states that school authorities may require superior ethical and moral behavior by their students "is inapplicable to activity by students involving the exercise of First Amendment rights." Without deciding whether this testimony was an expression of genuine artistic opinion (which is doubtful) the evidence of the pandering aspect must be considered. First, it should be noted that the words "indecent" and "obscene" are frequently used to express the same meaning. 50 Am. Jur.2d, *Lewdness, Indecency and Obscenity* §2, pp. 451-452; 20A *Words and Phrases,* pp. 520-524. In this case there was evidence of offensive aggressive actions to press this offensive, indecent, vulgar publication on a captive audience, including persons under 18 years of age, in a hallowed place.

The particular interest of the state government in such instances to protect its young citizens from indecent and obscene materials was recognized in *Ginsberg** v. *New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195. And the

* To be distinguished from *Ginzburg,* also cited on this page.

impropriety of federal intervention in matters of state interest involving obscenity has recently been emphasized in *Younger* v. *Harris*, —— U.S. ——, —— S.Ct. ——, 27 L.Ed.2d 669, and *Byrne* v. *Karalexis*, —— U.S. ——, —— S.Ct. ——, 27 L.Ed.2d 792, in instances in which irreparable injury to federal rights is not threatened. The *Ginsberg* case, *supra*, further recognized that a wider definition of obscenity existed for the young than for the adult portion of the community. In *Ginsberg*, obscenity "harmful to minors" was held to be properly proscribable. That permissible proscription is more than met by the materials which were distributed by plaintiff. Further, it is readily apparent that the "pandering" concept recently enunciated in United States Supreme Court cases is applicable in the case at bar. In *Ginsburg* v. *United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, it was held that, even assuming that the publications in question were not strictly obscene, the obscenity test was satisfied by the pandering manner of exploiting erotic appeal for commercial purposes. See also *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736; Note, *Pandering, First Amendment Rights and the Right of Privacy*, 22 Baylor Law Review 442, at 447, where it is noted:

> "The Court distinguished in *Stanley* v. *Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), between private possession of concededly obscene material, which is constitutionally protected, and possession for the purpose of sale or exhibit, which is not protected. This situation is different from *Rowan*—one deals with protected private possession and the other with protected private rejection—but both are based upon the right of privacy . . ."

Plaintiff argues that the university which suspended her:

> "... has no power to regulate or limit the distribution of written material of any kind whatsoever by its students on the public streets and thoroughfares, unless such distribution actually materially and substantially interferes with the requirements of appropriate discipline in the operation of the school";

and that, accordingly, Article V of Section B of the by-laws, if it includes plaintiff's conduct, is invalid on its face as applied because the material distributed by plaintiff is not "obscene" within the meaning of the applicable test announced in *Roth* v. *United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. The maintenance of a decent atmosphere in the area of Memorial Tower and the adjacent Student Union and chapel, and the protection of persons there from pandering indecent publications is a lawful mission of the university. Further, it is apparently plaintiff's conclusory contention that the distributed material is not "obscene" because, in accordance with the opinion of her witnesses, the material had, in terms of *Roth*, "redeeming social value." As noted above, in considering what is obscene, this Court may take into account what is emphasized in the sale and distribution of the materials by the purveyor of the allegedly obscene materials. In *Ginsburg* v. *United States*, *supra*, 16 L.Ed.2d at 35, the United States Supreme Court held that "the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity." Further, in *Ginsburg*, it was the ruling of the Supreme Court that, even in the case where a book may have social worth in a "controlled, or even neutral, environ-

ment," the work was without the ambit of First Amendment protection when:

> "Petitioners . . . did not sell the book to . . . a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity . . . ."

In *Gable* v. *Jenkins* (N.D. Ga.), 309 F. Supp. 998, affirmed 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed.2d 595, the rule of *Stanley* v. *Georgia, supra,* was held not to invalidate a Georgia statute forbidding the dissemination of "obscene materials" by any person. The same is true in this case, particularly with regard to the news story headlined, "Motherf ——— Acquitted." Assuming, without holding, that the story itself may be of redeeming social importance, that aspect was not made most prominent by the arrangement of the news article; rather, the obscene aspect was emphasized and featured in bold face type. The cartoon of policemen raping the Statue of Liberty and the Goddess of Justice features the crude, vulgar and obscene, obscuring any political or social commentary which might incidentally be made. This is particularly true in the university environment in which a substantial portion of the university population is under the age of 18 years and thus does not constitute the "controlled environment" in which such a cartoon might be considered as predominately a social commentary. The university community, which is mainly comprised of younger and less sophisticated persons than those mature persons who are interested in social comment, would not constitute a "controlled en-

vironment."* The indecent obscenity of the cartoon is recognized by plaintiff herself, who, in an article in the same issue of *Free Press Underground*, stated:

> "Someone might consider the cartoon on the cover of this issue 'vulgar'. It is not; it is obscene. But it is a social comment concerning a greater obscenity. Chicago cops are obscene; napalm is the greatest obscenity of the 20th Century; and administrators who fear a different view are also obscene."

Plaintiff contends that this does not constitute an admission, or any recognition otherwise, of the obscenity of the cartoon because the article:

> "... goes on to say that, in her view, obscenity is found in napalm, police brutality and similar things [and that] obviously she was using the word 'obscene' in a metaphorical sense and was not admitting for legal purposes that the cartoon is legally obscene."

Plaintiff reasserts the obscenity of the cartoon in her affidavit in this case in support of her motion for preliminary injunction. In *United States* v. *A Motion Picture Film* (S.D.N.Y.), 285 F. Supp. 465, 471, reversed on other grounds (C.A. 2), 404 F.2d 196, an admission in the government's brief of the social value of a film was said to be a "formal judicial admission." Be that as it may, the affidavit is graphic evidence that plaintiff understood the cartoon to be "obscene" in the common sense of the word. Further, the "metaphorical" use of the term "obscene" as applied to police activities, napalm, and administrative

*University records show some 1,031 students enrolled for the 1968 Fall Semester under 17 years of age.

shortsightedness would not excuse plaintiff's misconduct if accepted as true. The pandering of distinctly and flagrandy indecent, vulgar, obscene sexual cartoons and words to convey a claimed social and political message is not protected by the First or Fourteenth Amendments under the circumstances of this case. In this respect, this case is different from the recent case of *Keefe* v. *Geanakos* (C.A. 1), 418 F.2d 359, in which it was held that a public high school teacher could not be dismissed for pronouncing aloud and discussing in a literature class the "vulgar term for incestuous son." In *Keefe*, it was found that the word, "although repeated, is not artificially introduced, but is important in the development of the thesis and the conclusions of the author." Such is not the case at bar, where the indecent obscenities are appropriate neither to the place, the subject, nor to the comment thereon. Nor were they introduced in a serious classroom study of literature, without pandering. Quoting *Ginsberg* v. *New York, supra*, the *Keefe* case further held "that what is to be said or read to students is not to be determined by obscenity standards for adult consumption." 418 F.2d at 362.

Finally, plaintiff alternatively contends that the condemnatory phrase—"indecent conduct or speech"—of the by-law under which she was dismissed is "excessively vague and does not provide a meaningful standard for limiting speech"; and that the by-law is overly broad. In support thereof, plaintiff cites *Smith* v. *California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed.2d 205, reh. denied 361 U.S. 950, 80 S. Ct. 399, 4 L. Ed.2d 383, and *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed.2d 225. But the former case requires "scienter" in a criminal prosecution and the latter involved the question of vagueness under a municipal licensing ordinance. This is not a crimi-

nal prosecution. For the purposes of university regulations, "indecent conduct or speech" is a definite enough phrase to pass constitutional tests in its nearly being synonymous with "obscene." The university has a wide latitude and discretion in formulating rules and regulations and general standards of conduct. *Goldberg* v. *Regents of University of California*, 248 Cal. App.2d 867, 57 Cal. Rptr. 463, 478. The *Roth* test has been spoken of by the Supreme Court as requiring the application of a "standard of decency." See *Manual Enterprises* v. *Day*, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed.2d 639, 645. The terms are otherwise defined as being synonymous, or nearly so. See Black's Law Dictionary (4th Ed.), p. 909; cf. §1462, Title 18, United States Code; *United States* v. *Alpers*, 338 U.S. 680, 70 S. Ct. 352, 94 L. Ed. 457. This is particularly true in the light of the established principles that substantive disciplinary standards of colleges "may require superior ethical and moral behavior" and that:

> "The legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally vague does not, in the absence of exceptional circumstances, apply to standards of student conduct. The validity of the form of standards of student conduct, relevant to the lawful missions of higher education, ordinarily should be determined by recognized educational standards." *General Order, supra*, at 145, 146.[1]

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[1] In the recent case of *Hasson* v. *Boothby* (D. Mass.), 318 F. Supp. 1183, 1187, it was said:

> "[S]tudents may be severely punished by a school administration under its inherent authority without a prior published rule specifically prohibiting the conduct in question . . . See, e.g., *Esteban* v. *Central Missouri State College*, W.D. Mo.,

This court need not decide the question of overbreadth in this case, however, because the obscene publication distributed by plaintiff was not within the First Amendment protections. *Beauharnais* v. *Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919, reh. denied 343 U.S. 988, 72 S. Ct. 1070, 96 L. Ed. 1375; *Roth* v. *United States, supra;* Anno., Right of Free Speech, 2 L. Ed.2d 1706, 1712-1713; *United States* v. *Apple* (D. Md.), 305 F. Supp. 330, affirmed (C.A. 4) 417 F.2d 1070. The plaintiff was not chilled, but encouraged, in her activities by the alleged overbreadth, nor was she doubtful of whether her actions constituted misconduct. The regulation was as precise as federal statutes and court decisions on obscenity. See § 1462, Title 18, U.S.C.; *United States* v. *Alpers, supra.* Further, the vagueness and overbreadth argument is without merit, first, because plaintiff received a precise oral order from an authorized person, the Dean of Students, a week earlier. Distribution of the same issue was clearly forbidden in this authorized and lawful order; second, because the underlying regulation was not unconstitutionally vague or overbroad under criminal law doctrines. *Roth* v. *United States, supra.* Finally, the arguments have been held inapplicable in *Esteban* v. *Central Missouri State College* (C.A. 8), 415 F.2d 1077.*

1968, 290 F. Supp. 622, aff'd 8 Cir. 1969, 415 F.2d 1077; *Jones* v. *State Bd. of Ed.*, M.D. Tenn., 1968, 279 F. Supp. 190, aff'd 6 Cir. 1969, 407 F.2d 834, cert. granted 1969, 396 U.S. 817, 90 S. Ct. 145, 24 L. Ed.2d 69, but dismissed 1970, 397 U.S. 31, 90 S. Ct. 779, 25 L. Ed.2d 27; *Barker* v. *Hardway*, S.D.W. Va., 1968, 283 F. Supp. 228, aff'd 4 Cir. 1968, 399 F.2d 638, cert. den. 1969, 394 U.S. 905, 89 S. Ct. 1009, 22 L. Ed.2d 217; *Norton* v. *Discipline Committee of East Tennessee State University*, 6 Cir. 1969, 419 F.2d 195, cert. denied 1970, 399 U.S. 906, 90 S. Ct. 2191, 26 L. Ed.2d 562. And the Court of Appeals for the First Circuit has indicated in dictum that it is generally inclined to favor this view. *Richards* v. *Thurston* [(C.A. 1), 424 F.2d 1281]."

* See note 7, *supra.*

In support of her further contentions that she is entitled to protection of her rights under the First Amendment, plaintiff cites *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed.2d 731; *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070; *Burnside* v. *Byars* (C.A. 5), 363 F.2d 744; *Dickey* v. *Alabama Board of Education* (M.D. Ala.), 273 F. Supp. 613; *Hammond* v. *South Carolina State College* (D.S.C.), 272 F. Supp. 947; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed 2d 1311; and *West Virginia* v. *Barnette*, 319 U.S. 624, 87 L. Ed. 1628. But those cases did not involve the problem of indecent publications and pandering to youths under 18 years of age, among others. On that score, plaintiff invokes an unreported case purportedly upholding the non-obscenity of this same cartoon on a poster, *People* v. *Brown*, decided by a Judge of the County Court of Suffolk County, New York. Plaintiff quotes the following from that decision:

> "Although the demonstrated ability of its creator does not indicate any prospect of immortal recognition and memory among his fellow man, on the whole the poster is undeniably a savage political cartoon picturing one man's analysis of some aspect of society.
>
> "Satire has always been one of the most physically lacerating and emotionally irritating weapons of the disenchanted, and the fact that a policeman was goaded by the thrust of the cartoon [into applying for a warrant and order of seizure authorizing a search for obscene material] indicates that the designer's message was obvious as his lack of subtlety."

If such a final decision exists, it is neither persuasive or controlling. That case did not involve the pandering in the distribution of the material which is present in the case at bar. The same distinction applies in respect to *Vought* v. *Van Buren Public Schools* (E.D. Mich.), 38 U.S. Law Week 2034, 306 F. Supp. 1388, and *Luros* v. *United States* (C.A. 8), 389 F.2d 200.

Plaintiff's contention of overbreadth of the regulation is based upon the authority of *Soglin* v. *Kauffman, supra,* in which the concept of overbreadth was applied to state university regulations. That case, however, takes issue with this Court's decision in *Esteban* v. *Central Missouri State College, supra,* wherein judicial notice was taken "that outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education." 290 F. Supp. at 630. See also *Gable* v. *Jenkins, supra.* Furthermore, even if *Soglin* v. *Kauffman, supra,* were followed, no relief would be granted in this case. In that case, the district court concluded that:

> "... injunctive relief with respect to the application of the standard of 'misconduct', without more, should be denied in this action, and that the plaintiffs and the members of their classes should be left to seek judicial review of the validity of this standard retrospectively, case by case, as it has actually been applied." 295 F. Supp. at 996.

Finally, if university authorities must describe in detail the prohibited, obscene, vulgar and intentionally repulsive acts which constitute student misconduct, a provocative game of

imagining and implementing endless series of undescribed obscenities, vulgarities and repulsive acts will begin to the detriment of education and to the discredit of the law. In educational history and administration detailed codes of student conduct have been found undesirable. Brady and Snoxell, *Student Personnel Work in Higher Education* (Houghton Mifflin, Boston 1961), p. 378, and *Student Discipline in Higher Education* 10; Williamson and Foley, *Counselling and Discipline* (McGraw-Hill 1949) 1-49, 79-83, and others cited in *General Order, supra.*

Further, it should be noted that in another field the United States Supreme Court has recently reaffirmed the principle that persons granted special privileges or rights under state law, such as the qualified right to practice law, may be required to possess and exhibit superior moral standards. See *Baird* v. *State Bar of Arizona,* —— U.S. ——, —— S. Ct. ——, 27 L. Ed.2d 639, and *In re Stolar,* —— U.S. ——, —— S. Ct. ——, 27 L. Ed.2d 657, relating to state bar applicants. These principles by analogy apply to students in an institution of higher learning.

All of plaintiff's contentions are therefore without merit in fact or law. It is therefore

ORDERED that rendition of final judgment be no longer stayed.[9] It is further

ADJUDGED AND ORDERED that plaintiff's complaint for declaratory and injunctive relief be, and it is hereby, denied and that judgment be, and it is hereby, entered for defendants and against plaintiff.[10]

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[9] Although some of the relevant cases pending in the Supreme Court remain undecided, plaintiff's counsel has requested that entry of final judgment be no longer stayed. See note 3, *supra.*

[10] The court notes that on May 10, 1971, after the entry of the judgment herein, it received the decisions of the Supreme Court

/s/ WILLIAM H. BECKER
William H. Becker
Chief Judge

Kansas City, Missouri
Date: May 7, 1971.

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of the United States in *United States* v. *Reidel*, —— U.S. ——, —— S. Ct. ——, —— L. Ed.2d ——, 39 U.S. Law Week 4523, and *United States* v. *37 Photographs*, —— U.S. ——, —— S. Ct. ——, —— L. Ed.2d ——, 39 U.S. Law Week 4518. Both cases reaffirmed the vitality of *Roth* v. *United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed.2d 1498, a case relied on by the Court for the decision in this case. Further, the Supreme Court held the rule of *Stanley* v. *Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed.2d 542, inapposite to cases in which public distribution is involved, as in the case at bar. In *United States* v. *37 Photographs, supra*, 39 U.S. Law Week at 4522, the Supreme Court stated:

> "Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution. As we held in *Roth* v. *United States*, 354 U.S. 476 (1957), and reiterated today in *Reidel, ante*, obscenity is not within the scope of first amendment protection."

Similarly, in *United States* v. *Reidel, supra*, 39 U.S. Law Week at 4524-4525, the Supreme Court refused to limit involvement of the law with obscenity "to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age" and upheld the conviction of defendant of violating §1461, Title 18, U.S.C., stating that:

> *"Roth* has not been overruled. It remains the law in this Court and governs this case . . . Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned."